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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 577

HARTFORD FIRE INSURANCE COMPANY,
a Corporation,
Petitioner,

vs.

DOMENICO ROBERTO and VINCENZO AMMIRATI,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

Petitioner has filed its Petition for Certiorari and Brief in Support thereof under one cover. References to that document will be indicated—"Pet. Br.," followed by page number. References to the printed transcript of record will be indicated—"Tr.," followed by page number.

This is an action upon a policy of fire insurance issued by the petitioner to the respondents.

The opinion of the Circuit Court of Appeals is reported in 177 F. 2d 811, and appears in the transcript of record at page 337, *et seq.*

No opinion was rendered by the trial court; but two memorandum opinions were filed by it on certain phases of the pleadings which opinions appear in the transcript at pages 75, *et seq.* and 92, *et seq.*

We are impelled to point out that the petitioner has intertwined statements and arguments in a manner which we believe to be somewhat irregular. We make this observation so that your Honors will the more readily apprehend the unusual format of the introductory portion of our brief.

Some of the statements contained in the petition are inaccurate and some wholly misleading. We shall point out such inaccurate and erroneous statements in the same sequence in which they occur in the petition.

Under the caption "Other Federal Statutes Involved" (Pet. Br., p. 2) counsel for petitioner advance their notions of the questions involved. Since such questions are specifically argued in a subsequent portion of petitioner's brief we defer here commenting thereon, but shall do so at an appropriate portion of this brief.

It is asserted (Pet. Br., p. 2) that "This case presents highly important Federal questions not heretofore decided by this court." What the petitioner really seeks is a re-reading and re-analysis of the entire evidence with the expectation that this Court will disagree with the Court of Appeals which held that the evidence and applicable law sustain the verdict of the jury and the judgment entered thereon. It is not the purpose of a certiorari to review such evidentiary disputes of no public importance.

The petition alleges that a writ of certiorari should be granted in order to correct a miscarriage of justice and remove a harmful precedent. Both grounds are based upon certain misconceptions of fact and law. These misconceptions will be considered in the order of their appearance in the petition.

This case is not one of "Peculiar Gravity" nor can it be said to be one of "General Importance", however important it may be to the petitioner herein, and certainly no constitutional question is presented. If the feelings of the individual litigant were made the test in these insurance cases, nearly every decision of a Court of Appeals would have to be reviewed, for every litigant naturally thinks that his particular situation is one of peculiar gravity. Viewed objectively, however, the present claim by petitioner is not one of either sufficient gravity or importance as to call for a review by this Court as such a review is not needed to clarify the already well defined propositions of law which are involved.

As we understand the law of certiorari, the challenged opinion of the Circuit Court of Appeals must show on its face that it is so far at variance with established law that it should not be permitted to stand unrebuked. To determine this, the opinion alone of the Circuit Court of Appeals should be examined.

The statements made by petitioner appearing on pages 3 to 18, both inclusive, of its petition, improperly intertwined with argument on the law and the citation of authorities, require no comment or reply at this point in our brief since all such statements are argued *in extenso* in petitioner's brief to which we shall make reply, but we do desire to point out to the Court two erroneous statements made by petitioner which are not argued in its brief.

We perceive no reason for the reference to Ammirati's citizenship made by petitioner because no point is made on this score either in the petition or brief of petitioner. The reason for the cancellation of Ammerati's citizenship is found in the footnote to the opinion of the Court of Appeals (Tr. 340).

It is asserted that the instant case could not be tried between the time when Italy declared war on the United States and the signing of the Peace Treaty, and in support of that unwarranted statement there is cited *Ex Parte Colonna,* 314 U.S. 510. All that need be said with reference to this authority as it applies to the case at bar has been said by this Court in *Ex Parte Kawato,* 317 U. S. 69.

Under the caption "The Judgment of the District Court" (Pet. Br., p. 13) complaint is made that the verdict of the jury was augmented with interest at the rate of 5 per cent per annum, that being the legal interest rate upon policies of insurance as provided by the statutes of the State of Illinois, "even for those years when the case could not be tried under the decisions of this Court because both respondents were then alien enemies". Primarily it may be stated that when the verdict of the jury was augmented by interest no objection thereto was made by counsel for petitioner.

The order augmenting the verdict was entered May 24, 1948 (Tr. p. 293). Petitioner's motion for a judgment notwithstanding the verdict or in the alternative for a new trial was filed May 27, 1948 (Tr. p. 294). In that motion no objection was raised to the fact that the verdict of the jury was augmented by interest. In petitioner's Statement of Points on Appeal (Tr. p. 304) no point was raised that the trial Court improperly augmented the verdict.

Precedents for Denial of the Petition.

It is the established practice of this Court not to grant certiorari to review evidence. *United States* v. *Johnston,* 268 U. S. 220, 227; *The Arizona* v. *Anelich,* 298 U. S. 110, 117.

Findings of fact in which the lower courts have concurred will not be disturbed by this Court unless shown to be clearly erroneous. *Stuart* v. *Hayden*, 169 U. S. 1; *Texas & P. Ry. Co.* v. *Railroad Commission*, 232 U. S. 338; *Texas & N. O. R. Co.* v. *Brotherhood Ry. & S. S. Clerks*, 281 U. S. 548, 558; *Crowell* v. *Benson*, 285 U. S. 22, 65; *United States* v. *Commercial Credit Co.*, 286 U. S. 63, 67; *Continental Ill. Nat. B. & T. Co.* v. *C. R. I. & P. R. Co.*, 294 U. S. 648, 678; *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, 4.

Every point made by the petitioner in its brief here has been carefully considered and fully answered in the opinion of the Circuit Court of Appeals. All of such points were again considered when its petition for a rehearing was denied by that Court (Tr. 366).

ARGUMENT.

Under the caption "Argument" petitioner has divided its brief into seven numbered divisions. We shall respond to those numbered divisions in the same sequence, with like numbering.

1.

We never asserted that the respondents had a "constitutional right" to sue in our courts. The opinion of the Circuit Court of Appeals does not so hold. We fail to perceive the reason why this pseudo issue is advanced by petitioner.

2.

We do not dissent from the statement that United States District Courts possess and have only that jurisdiction expressly bestowed upon them by the Congress. Again the Circuit Court of Appeals does not hold to the contrary. Just how that statement of law, if answered in the affirmative, aids petitioner is not made clear, nor do we perceive that an acquiescence in that proposition of law affords any basis for the issuance of the writ. None of the authorities cited under this subdivision of petitioner's brief can in any wise serve as a basis for the issuance of the writ sought.

3.

Respondents were not barred from maintaining and prosecuting their action against the petitioner by reason of the deportation of the respondent Roberto.

Counsel for petitioner by asserting their understanding of the intent of Congress in enacting the statute which is now known as Title 28, U.S.C.A., Sec. 132, reach the con-

clusion that the respondent Roberto had no right to institute and prosecute, jointly with the respondent Ammirati, an action against the petitioner in the United States District Court. In support of that astonishing statement no authority is cited, and, in fact, no authority can be found for that statement.

Reference is also made by the petitioner to Title 8, U.S.C.A., Sec. 41, and it is further asserted that in enacting this statute Congress only granted to aliens within the jurisdiction of the United States the right to sue to enforce contracts. As would be well expected counsel for petitioner cite no authority for this startling proposition of law. In other words, all the District Courts, the Courts of Appeal, aye, even this Court, are asserted to have in the past consistently and erroneously construed this statute and by such asserted erroneous construction afforded non-resident aliens the right to sue in our Federal courts. If that proposition of law were not seriously advanced we would not deign to answer it. Granting good faith in advancing it, we point out to your Honors that in *Ex parte Kawato,* 317 U. S. 69, this Court stated (p. 74) "Even if petitioner were a non-resident enemy alien it might be more appropriate to release the amount of his claim to the alien property custodian than to the claimants."

In *Birge-Forbes Co.* v. *Heye,* 251 U. S. 317, Heye, a cotton broker in Bremen, instituted suit against Birge-Forbes Co., a cotton exporter in Texas, to recover sums that Heye paid for its account. Heye recovered a judgment, which was affirmed, with a modification as to payment, by the Circuit Court of Appeals. After the case had been taken to the Circuit Court of Appeals a motion was made to dismiss or suspend the suit on the ground that Heye had become an alien enemy by reason of the declaration

of war between Germany and the United States. The Circuit Court of Appeals affirmed the judgment with the modification that it should be paid to the Clerk of the trial court and by him turned over to the Alien Property Custodian. All that need be said with reference to this authority as it applies to the case at bar is stated in the first full paragraph on page 323 of the opinion in which this Court speaking through the much revered Mr. Justice Holmes held that a non-resident enemy alien could maintain and prosecute to judgment suit in our Federal courts.

We are further fortified in our position that Roberto could jointly with the respondent Ammirati maintain their action in a Federal court by the decision of the Circuit Court of Appeals in *Petition of Bernheimer,* 130 F. 2d 396. In that authority the petitioners came from the German Reich and lawfully entered the United States and registered as required by law. Both petitioners were injured in an automobile accident for which they instituted suit in the District Court of the United States. Because the District Court would not order the case placed on the trial list and because the order was not one from which an appeal could be taken, the petitioners filed application for a rule to show cause why a peremptory writ of *mandamus* should not issue to place the case on the trial list. The Circuit Court of Appeals ordered the writ to issue and in doing so, insofar as the opinion has application to the case at bar, expressed itself as follows (p. 397):

> "It is not even the case that a suit may not be prosecuted on behalf of an enemy subject even though resident in enemy or neutral territory. Such suits are occasionally allowed to proceed to judgment where adequate measures may be taken to prevent advantage to the enemy. See *Birge-Forbes*

Co. v. *Heye, supra; Propper* v. *Buck,* 178 Misc. 76, 33 N.Y.S. 2d 11, affirmed 263 App. Div. 948, 34 N.Y.S. 2d 134; *Weiditschka* v. *Supreme Tent of Knights of Maccabees of the World,* 188 Iowa 183, 170 N.W. 300, 175 N.W. 835; *Geiringer* v. *Swiss Bank Corp.* (1940) 1 All Eng. R. 406; and *White Engineering Corp.* v. *Canadian Car and Foundry Co.* (1940) 43 Quebec Pr. 419."

We respectfully assert that these two opinion dispose of the contention here advanced by the petitioner.

Counsel for petitioner lose sight of the fact that the Federal Statutes (Title 28, U.S.C.A., Section 41) upon which the right of an alien to bring suit in our courts is predicated, make no distinction between a non-resident alien and a resident alien in so far as his right to sue is concerned. The statute provides that the District Court has jurisdiction of civil suits where the jurisdictional amount is involved and where the action is between citizens of a state and "foreign states, citizens or subjects". It does not make it a condition to sue that the foreign citizen or subject be a resident. The bold and sweeping statements of counsel for petitioner as to the intent or lack of intent of Congress in passing Title 28, U.S.C.A. Sec. 41 are not persuasive or relevant in the face of the plain words, above quoted, which permit a foreign citizen or subject to bring suit against a citizen of the United States. In attempting to construe the above enactment the first and most important rule is to give the language used its plain and ordinary meaning. If we do this we reach the conclusion that an alien, whether he be resident or non-resident, may bring action against a citizen of a state of the United States if the jurisdictional amount is involved. In short the respondent Roberto comes within the plain description of the persons who may bring such an action. Throughout the petition and

brief of petitioner is a running comment which stigmatizes Roberto as a "denaturalized and deported alien". In so far as this case is concerned Roberto is a non-resident alien.

Diligent search has failed to reveal any decision of this Court, or of any of the inferior Federal Courts, which places a "denaturalized and deported alien" in a differ-category from any non-resident alien. Counsel for petitioner have furnished this court with no authority to sustain this distinction.

Counsel for petitioner make this further point that the respondent Roberto was illegally in this country when the policy of insurance in question was issued and that therefore he had no right to bring this action. The facts in this respect are well stated in the opinion of the Court of Appeals (Opinion, Tr. 337 at 339) from which it is clear that the respondent Roberto was legally in the United States when petitioner issued the policy of insurance here sued upon.

For the proposition of law that an alien who is illegally here may not institute suit in our courts, petitioner relies upon *Coules* v. *Pharris,* 212 Wisc. 558, 250 N.W. 404. A reading of that authority will disclose that the facts there before the court and the factual issues in the instant case are in no wise comparable. In its opinion the Circuit Court of Appeals considered this authority and held it no bar to the instant case.

The leading state court decision on this subject is *Janusis* v. *Long,* 284 Mass. 403, 188 N.E. 228. The Massachusetts Supreme Court in a scholarly and pursuasive opinion reached exactly the opposite conclusion to that reached by the Wisconsin court. It is true that in the Massachusetts case the cause of action arose

from personal injuries sustained by the plaintiff. The Massachusetts court in its opinion made no distinction between the right of a resident alien to recover in a tort case and his right to recover in a contract case. Furthermore, it is to be borne in mind that in the Massachusetts case the plaintiff was permitted to recover even though he had offended against the laws of the country in illegally entering.

The New York court had before it the same question as was presented to the Massachusetts and Wisconsin courts in the case of *Feldman* v. *Murray*, 12 N.Y.S. 2d 533. There the court considered both the Wisconsin and Massachusetts decisions. Its decision put New York on record as following the Massachusetts rule, and it also referred to the case of *Martinez* v. *Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576, in which the same conclusion was reached as was reached in the Massachusetts case.

In the case of *Arteaga* v. *Allen*, 99 F. 2d 509, the court reached the same conclusion as was reached by the Massachusetts, New York and the United States District Court in the cases hereinabove cited.

All of these authorities were commented on by the Circuit Court of Appeals in its opinion in this case.

4.

There was no fraudulent concealment by respondents of facts relevant and material to the risk assumed by the petitioner.

We have no quarrel with the definition of moral hazard recited in petitioner's brief. However, we are at a loss to determine its applicability to the case at bar. There is not a single word in the record before this Court upon which there can be predicated any charge or foundation that the prior acts and doings of Roberto in any manner

increased the hazard or risk of the defendant. No witness testified that respondents, or either of them, could or would or did profit by the destruction of the insured premises. There was no testimony that the property was over-insured, or that the loss sustained by the respondents did not far exceed the total amount of insurance. The contention of moral hazard advanced by the petitioner loses all of its vitality when consideration is given to the stipulation of the petitioner as to the damage to the property in question (Tr. 146).

The petitioner claims that the respondent Roberto fraudulently concealed from it the fact that he had been indicted, convicted, incarcerated and deported. Even assuming that Roberto concealed from the petitioner such facts, nevertheless, there is not a single word in the record to show that such concealment in any wise, to any extent whatsoever, increased the hazard or risk of the petitioner which it assumed under its policy of insurance.

Where the insurer fails to question the insured upon the issuance of the policy of insurance, as in this case, the latter cannot be held to have been guilty of such concealment as will avoid the policy unless he withholds facts which he knows, or as a reasonable man should know, to be material to the risk, and unless he also perpetrates such concealment intentionally or fraudulently or with the affirmative intent to procure insurance which could not be obtained after a disclosure of such facts.

It is not shown by the evidence, and counsel for petitioner have not pointed it out in their brief, how it would have been even remotely possible for Roberto to have concealed his past record. It is somewhat a tax on credulity to assume that Roberto was not well known to all persons in the small city of Chicago Heights, having a population of approximately 25,000 persons (Tr. 174),

and certainly he was well known to persons with whom he had business relations, and particularly including the procuring of insurance.

The evidence is clear that petitioner's general agent, or, as it is usually termed, the writing agent, William H. Donovan, Senior, knew the respondents well for many years prior to the issuance of the policy sued upon, and that he had previously insured property of these respondents. William H. Donovan, Senior, did not testify and there is absolutely no evidence in the record as to what he did not know. Counsel for petitioner term William H. Donovan, Jr., who did testify, petitioner's agent, but in fact Donovan, Jr., who was at that time 24 years old, simply worked for his father and was not the agent for petitioner. It is also clear that before the issuance of the policy in question the activities of Roberto which led to his deportation were front page news in the little community of Chicago Heights in which the respondents and Donovan, Senior, lived. In the face of all this when the respondents desired insurance on the property in question they still went to Donovan, Senior, for that coverage. How under these circumstances can the petitioner seriously advance to this Court the preposterous claim that the respondents are guilty of fraudulent concealment of material facts?

Whether petitioner would have issued the policy of insurance had it knowledge of the cancellation of respondents' citizenship papers, and the arrest, conviction and incarceration of Roberto and the subsequent deportation proceedings was one of the questions submitted to the jury. There is no evidence that the petitioner's writing agent Donovan, Senior, would not have written and issued the policy had he lacked knowledge of such facts. Donovan, Senior, did not so testify.

We have carefully read each decision cited by the petitioner in support of the proposition here advanced by it. Each decision is readily distinguishable from the case at bar by particular facts not comparable to the facts in the instant case.

In *Queen Ins. Co.* v. *Cummins,* 267 S. W. 144, cited by petitioner, the sole question was whether the failure of the insured to inform the insurance company of certain encumbrances against the mortgaged property avoided the policy. An answer interposed by the insurance company pleaded such defense and a demurrer to that answer was sustained and an appeal taken. This authority has no application to the factual situation in the case at bar.

In *Fireman's Fund Ins. Co.* v. *McGreevy,* 118 Fed. 415, also cited by petitioner, the insured was a local agent for the defendant insurance company. He had been given a book of instructions issued by that company. There were instructions in the book which plainly indicated that had the agent given the insurance company full information it would not have issued the policy. The agent was acting in a dual capacity, being both assured and agent, and under the well recognized rule of law there was a presumption that the agent would conceal from his principal any facts which might be detrimental to his own interest.

Counsel for petitioner in discussing this authority say (Pet. Br., p. 30): "No questions were asked and no representations made by the assured to procure the insurance." This statement is misleading. No questions were asked because the assured was the agent of the company. He knew all the facts and as such agent knew that the company would not have written the policy had he, as such agent, given the company all the information in his possession. Plainly this authority has no application to the case at bar.

The case of *Sebring* v. *Fidelity-Phenix Fire Ins. Co.*, 255 N. Y. 382, 174 N. E. 761, also cited by petitioner, if it has any application to the case at bar, is one favorable to respondents. The petitioner quotes an excerpt from the opinion in this case. If counsel for petitioner had enlarged their quotation they would have disclosed, we believe, that this decision does not support their contentions. We remedy the deficiency, and quote further from that opinion (p. 762):

> "Duty to disclose a material fact manifestly is not the same thing as materiality itself. Concealment is the designed and intentional withholding of any fact material to the risk which the assured in honesty and good faith ought to communicate to the underwriter. *Daniels* v. *Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 425, 59 Am. Dec. 192. A fact may be material, yet, under certain circumstances, courts have held that no obligation rests upon the assured voluntarily to reveal it. * * * Unless nondisclosure of a fact, concerning which he has not been asked, be fraudulent, the applicant's omission to state it will not avoid a fire or life policy. (Citing authorities.) If fraudulent intent be present, of course, the opposite result will follow. In order to constitute fraud, there must be suppression in bad faith with intent to mislead the insurer."

Counsel for petitioner next cite *Stipcich* v. *Metropolitan Life Ins. Co.*, 277 U. S. 311, which was an action on a policy of life insurance. The rule of law applicable in actions on life insurance policies is not the same as the rule applied to fire insurance policies. Where a life insurance policy is issued an application is required and answers in writing are made. The applicant knows exactly what information the company desires and must truthfully and in good faith furnish the requested information.

N. Y. Life Ins. Co. v. *Gay*, 36 F. 2d 634, next cited by petitioner, is similar to the *Stipcich* v. *Metropolitan Life Ins. Co.* case just discussed.

Harrison State Bank v. *United States Fidelity & Guaranty Co.*, 94 Mont. 100, 22 Pac. 2d 1061, next cited by petitioner, is far removed factually from our case. In this authority the cashier of the bank, who was also the local agent of the insurance company, obtained the issuance of the policy of insurance, being one of burglary and robbery. The agent made no disclosure of his knowledge relative to a proposed robbery of the bank and the insurance company had no knowledge of such proposed robbery. His failure to make disclosure of this highly pertinent information was held to be fraudulent concealment.

4a.

Whether there was a fraudulent concealment of material facts was a question of fact for the jury.

It is stated by counsel for petitioner that "no underwriter of ordinary ability or for that matter, any person with ordinary intelligence, exercising ordinary care and caution, would write a contract of indemnity to protect such a denaturalized and deported alien against loss to his property." Strange as it may seem to counsel for petitioner there did exist two underwriters of that category who did issue policies of insurance to respondents as will readily appear from the complaint herein (Tr. 2) where the two underwriters lacking ordinary ability and ordinary intelligence were the other two insurance companies who issued policies of fire insurance upon this same property of the respondents.

It is urged by the petitioner that the respondent Roberto having experienced the different proceedings instituted against him must have known that if such facts were

known he could not procure insurance. A simple and terse answer is that the jury having all the facts before it disagreed with counsel for petitioner, as did also the trial judge when he entered judgment upon the verdict and denied petitioner's motion for a new trial, and as did also the Circuit Court of Appeals.

That the question of fraudulent concealment of material facts was submitted to the jury for its determination is beyond controversy, since it appears from the record that the petitioner requested, and the court gave, a specific instruction to the jury upon such issue. Petitioner's instruction 1 (Tr. 220) unequivocally embodied that issue.

That the trial court properly submitted that issue to the jury has been the immutable law certainly since the time of the great Chief Justice John Marshall. Chief Justice Marshall pronounced the doctrine in *Maryland Ins. Co.* v. *Rugan's Administrator,* 6 Cranch 426, in which case he stated (p. 427):

> "It is well settled that the operation of any concealment on the policy depends on its materiality to the risk, and this court has decided that this materiality is a subject for the consideration of a jury."

Chief Justice Marshall reiterated this proposition of law in *Livingston* v. *The Maryland Ins. Co.,* 6 Cranch 274, where he stated (p. 279) that "the effect of the misrepresentation or concealment on the policy depends on its materiality to the risk. This must be decided by a jury under the direction of a court."

Another Chief Justice of this Court reached the same conclusion when Chief Justice Taft at the time he graced the Circuit Court of Appeals, Sixth Circuit, in speaking for the court in *Penn Mut. Life Ins. Co.* v. *Mechanics' Savings B. & T. Co.,* 72 Fed. 413, said (p. 430) that "the question whether a fact is material to the risk is always a

question for the jury." Then follows a learned discourse on the subject by Chief Justice Taft, in which he adverted to and discussed many authorities on the subject, including a reference to the opinion of Chief Justice Marshall in *Maryland Ins. Co.* v. *Rugan's Administrator,* 6 Cranch 426, *supra.*

The identical proposition of law when it again came before the Federal courts was again similarly determined as being a question of fact for the jury.

Camden Fire Ins. Assn. v. *Penick,* 2 F. 2d 964, 965.

Atlas Assur. Co. v. *Hurst,* 11 F. 2d 250, 253.

National Fire Ins. Co. v. *Renier,* 22 F. 2d 671, 672.

4b.

No question of public policy is herein involved.

We harbor the belief that no response is needed to the almost inane statement made by counsel for petitioner under this subdivision of petitioner's brief. The statement that no underwriter should be required to ask of an applicant for fire insurance the questions outlined is completely answered in *Granger* v. *Providence-Washington Ins. Co.,* 200 Fed. 730. In that case the libellants had chartered a schooner to carry certain timber. They had insured the cargo with the defendant. There was a discrepancy between the amount of lumber recited in the bill of lading and that recited in the policy of insurance and this discrepancy was explained as being a practice in that trade. In the course of her voyage the vessel encountered heavy weather and jettisoned some thousands of feet of lumber bringing the rest of the cargo in safety to destination. The libellants brought suit upon the policy upon the loss of the jettisoned lumber. The trial court dis-

missed the libel on the ground that the libellants admitted that it had been their practice to understate the footage of dressed lumber for freight purposes. The trial court held that this practice was a fact material to the risk which the libellants were obligated to disclose.

In reversing the decree of the trial court the Circuit Court of Appeals expressed itself in the following language (p. 733):

> "It seems to us to be going quite too far to hold that underwriters may be discharged of their liability for a claim in every respect regular, because they were not informed by the insured that he had often been guilty of fraudulent practices, or was in the particular case guilty of a fraud upon the owners of the vessel, which in no respect affected the actual risk. Some underwriters might be unwilling to insure the property of a dishonest man, or of a liar, or of a drunkard; but it would be unreasonable to relieve an underwriter of liability for a perfectly regular claim on the ground that the insured should have informed him that he was dishonest, untruthful or intemperate."

This decision, we respectfully assert is uniquely applicable to the case at bar. The language in the above excerpt well expresses the situation in the case at bar.

In *Transcontinental Ins. Co.* v. *Minning,* 135 F. 2d 479, an action had been instituted on a fire insurance policy. In that case, as in the case at bar, the insurance company contended that the policy was void because of material concealment by the assured. The court in affirming the judgment for plaintiff expressed itself in the following language (p. 481):

> "Concealment of matter which can in no way increase the risk does not avoid the policy. 22 Ohio Jur. 565; *Lexington Fire, Life & Marine Ins. Co.* v. *Paver,* 16 Ohio 324. * * * All that is required of him is that he shall not misrepresent, or designedly conceal any such facts, and that he answer, in good

faith, all questions asked him by the insurer, unless the fact not communicated is one of unusual peril to the property, and could not, with reasonable diligence, be discovered by the insurer, or anticipated as a foundation for specific inquiry."

A case very analogous to the case at bar is *Stecker* v. *American Home Fire Assur. Co.,* 299 N. Y. 1, where plaintiff, a fur merchant, procured from the defendant a so-called "salesman's floater policy" insuring plaintiff against loss or damage to his furs while being transported around the country for sale to plaintiff's customers. During the term of the policy, some furs were reported by insurer to have been stolen from him, and he then brought suit on the policy for the amount of his loss. As one of several defenses and counterclaims, defendant pleaded that plaintiff had concealed from it the fact, claimed by defendant to be material to the risk, that plaintiff, six years before purchasing this policy, had been convicted in a Federal Court of the crime of concealing assets from his trustee in bankruptcy.

The counterclaim, which prayed for the cancellation of the policy as void from its inception, was the subject of a separate trial before a judge without a jury. The trial court, on conflicting evidence, found as a fact that the insured had disclosed his criminal record to defendant, and, accordingly, entered an order dismissing the counterclaim on the merits.

The defendant appealed and that court, reversing the order below on the facts and the law, took a different view of the fact principally in controversy. Its finding was that there had been no disclosure at all to defendant by plaintiff of the 1938 conviction. On further appeal, the Court of Appeals, being the highest court in the State of New York, held that the weight of the evidence supported

the factual determination of the intermediate reviewing court, that is, that no disclosure was made.

In its opinion the court stated that plaintiff in taking out the insurance was asked no questions, signed no application, and furnished no information on the subject. The court said that if the so-called "ordinary rule" as to concealments by applicants for insurance be applied, then plaintiff's failure voluntarily to come forward with the story of his past would not void the policy. Such was the holding of the trial court and the intermediate reviewing court, both courts citing the leading case of *Sebring* v. *Fidelity Phenix Fire Ins. Co.*, 255 N. Y. 382, heretofore adverted to.

The court then pointed out the distinction between the "marine rule" and the "ordinary rule," discussed a number of authorities, and concluded that the "ordinary rule" as to non-disclosure is the one to apply in respect to policies like the one in suit, and that, as to such policies, if the insurer makes no inquiry, and the insured no representation, as to the fact in question, then the concealment, short of actual fraud, in respect to such a fact, does not void the policy.

5.

Public policy is not involved upon the question of excusing the respondent Roberto for appearing for examination under oath.

We are at a loss to perceive how the question of public policy arises in the case at bar. As we view it the public policy question is a figment of the imagination of counsel for petitioner. We are fortified in this conclusion by the trial court and by the Circuit Court of Appeals. Counsel for petitioner have not seen fit to argue the proposition and we believe that we may properly assume that lack of argument stems from lack of justification.

5a.

Respondent Domenico Roberto was excused from appearing for examination under oath in that he could not lawfully enter this country at the time the request for examination was made.

We assent to the proposition that a provision for examination under oath of an insured in a policy of fire insurance does not contravene any statutory enactment nor public policy, and is valid. Its enforcement depends upon a variety of factors; and we respectfully assert that in the case at bar a good and valid excuse existed for the non-appearance of the respondent Roberto.

The proposition here advanced by petitioner was submitted to the trial judge upon respondents' motion to strike paragraph 15 of Division II of the answer of the petitioner. This portion of the petitioner's answer appears on page 37 of the transcript, the motion to strike appears on page 41 of the transcript, and the opinion of the trial judge appears on page 75 of the transcript.

The trial judge rendered his memorandum opinion (Tr. p. 75) in which he sustained respondents' motion to strike and held that the respondent Roberto was excused from appearing for examination under the particular facts obtaining in the case at bar.

The authorities cited by counsel for petitioner present a correct proposition of law when properly applied to the facts as revealed in those cases; but there is much dissimilarity in the facts involved in those cases and in the facts in the case at bar, and we here purpose to point out to your Honors that no one of the authorities cited by the petitioner is applicable here.

The provision in the policy in respect to examination under oath is inserted for the benefit of the insurer, and

it must be given a reasonable interpretation and the demand for such examination must be reasonable and the time and place fixed in such demand for examination must be reasonable.

One of the authorities cited by petitioner is *Pearlstine* v. *Westchester Fire Ins. Co.*, 70 S. C. 75, 49 S. E. 4, where the court said (p. 6 of 49 S. E.):

> "It need hardly be said that if circumstances arising without fault of the insured which make it practically impossible for him to appear for examination, from necessity he will be excused."

The circumstances obtaining in the case at bar are precisely the situation recited in this authority in that it was impossible for Roberto to appear for examination, and so from necessity he was excused from doing so.

The opinion by this court in *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81, cited by petitioner, is not applicable to the facts in the case at bar.

It is to be pointed out that the respondent Ammirati appeared for examination under oath and was examined with the result that the petitioner was not denied knowledge and information "in regard to the facts, material to its rights, to enable it to decide upon its obligations, and to protect it against false claims." It is not asserted by petitioner that a fire did not occur, that there was not damage to the property of the respondents, and that it was not given full information in regard to that fire loss. Stripped of all needless and excess verbiage the whole case is resolved into the simple proposition that the petitioner is seeking to evade the payment of a lawful and just claim upon the inexcusable ground that because Roberto was incarcerated for a crime for which he paid the penalty, and was deported so that he was physically

unable to appear at the examination under oath in this country, petitioner should be relieved of its obligation and thus have a wind-fall. It is further to be pointed out to your Honors that if in good faith the petitioner desired to examine Roberto it could have done so, although, it is true, such examination of necessity would have occurred in Italy. Such opportunity was afforded the petitioner when the trial judge rendered his memorandum opinion upon this phase of this litigation (Tr. 75, 80).

The conclusion reached by the trial judge was approved by the Circuit Court of Appeals, and in doing so the latter embodied the conclusion and language of the trial judge upon this particular question (Opinion, Tr. 337, at 342).

5b.

Under this division of their brief petitioner urges that an assured cannot substitute an agent in lieu of himself to submit to an examination under oath. We never asserted a contrary position. The two authorities cited by petitioner under this division of its brief have no application to the facts in the case at bar as is obvious even from a reading of the excerpts taken from those two opinions.

5c. and 5d.

These two subdivisions of petitioner's brief can well be joined and we trust that such action on our part will meet with the approval of your Honors.

We respectfully urge that these two propositions of law require no answer because we never maintained that the respondent Roberto could properly refuse to appear for examination under oath by claiming his constitutional immunity or that his testimony might incriminate him.

We respectfully urge that counsel for petitioner are attempting to becloud this issue. No such point was advanced by petitioner in its motion for a new trial (Tr. 294) nor was such point advanced by petitioner in its Statement of Points on Appeal (Tr. 304).

The case of *Hickman* v. *London Assur. Corp.*, 184 Calif. 524, 195 Pac. 45, is not relevant to the case at bar in that in that case the assured refused to submit to an examination under oath on constitutional grounds. No comparable situation exists in the case at bar.

We have heretofore discussed the case of *Pearlstine* v. *Westchester Fire Ins. Co.*, 70 S. C. 75, 49 S. E. 4, and we therefore do not again discuss that authority.

We never did assert, and we do not now assert, that the respondent Roberto failed to appear for examination under oath in the exercise of his own choice or volition, but rather that his failure to appear was entirely involuntary because it was physically impossible for him to enter this country.

5e.

We admit that the proper place for holding an examination under oath is within the county where the loss occurs.

5f.

It is asserted by counsel for petitioner that the two Missouri cases relied upon by the respondents and followed by the lower courts do not sustain the latter's position. However, it is not asserted that the other authorities relied upon do not support the position of the respondents. These Missouri cases are discussed next following.

In *Phillips* v. *Protection Ins. Co.*, 14 Mo. 220, the insurance company made a demand upon the insured at his place of business that he submit himself to examination on the day of the demand. The fire had occurred in St. Louis, where the insured resided and had his place of business. At that time a cholera epidemic was raging in St. Louis. The insured had previously made arrangements to remove his family from St. Louis on the day set for the examination. The insured disregarded the notice and in accordance with his plans did remove his family from St. Louis to a distant city on the very day set for the examination, and did not return to St. Louis for several months. As stated by the court "the company put themselves on the refusal of the plaintiff to submit to an examination under oath on the day fixed as a complete bar to the claim." In respect to the insurance company's defense that the insured failed to submit himself to examination pursuant to the demand, the court said (p. 234):

> "We cannot suppose that it was encumbent upon the plaintiff to obey the requirements of the company at an unreasonable time, and under every condition or circumstance."

From this point on the above stated principle may be found reiterated in the decisions on this question. In *Knight* v. *Firemen's Ins. Co.*, 49 S. W. 2d 682, the insurance company claimed error on the part of the trial court in giving the following declaration of law at the plaintiff's request (p. 684):

> "The Court declares the law to be that if the Court finds from the evidence that the property destroyed was located in Holden, Missouri, and that Guy Knight was notified to appear at Clinton, Missouri, the failure of Guy Knight to appear and be examined at Clinton, Missouri, if he did so fail, constitutes no defense to this action."

The court there said (p. 686):

> "The notice was served on the insured while he was confined in jail and the defendant knew it; and it also knew that he could not respond to the notice except by the grace of the sheriff. Insured was given forty-five minutes in which to secure the documents called for, obtain his freedom, and appear at the place named in the notice. The demand was unreasonable."

We respectfully assert that another rule of law prevails which holds that if circumstances beyond the control of the insured arise which make it impossible for him to appear for examination under oath, at the time and place specified, his failure so to appear will be excused.

This rule of law is well exemplified in *Pearlstine* v. *Westchester Fire Ins. Co.*, 70 S. C. 75, 49 S. E. 4, where the court said (p. 6 of 49 S. E.):

> "It need hardly be said that if circumstances arise without fault of the insured which make it practically impossible for him to appear for examination, from necessity he will be excused."

Counsel for defendant also rely on the *Pearlstine* case, but we respectfully urge that it supports our position in that we maintain that Roberto failed to appear for the examination under oath not in the exercise of his own free choice or volition, but rather that his failure was entirely involuntary because it was physically impossible for him to enter into this country.

In the case of *Pierce* v. *Globe & Rutgers Fire Ins. Co.*, 182 Pac. 586 (Wash.), shortly after the fire occurred the insurance company served a written notice upon the insured that he appear at a certain time and place in the City of Seattle, Washington, for examination under oath as provided in the policy of insurance. The insured left his home in Pacific City, where the fire occurred, and pro-

ceeded to Seattle in order to attend the examination under oath, and on the way visited the office of the prosecuting attorney in response to the prosecutor's request. After the insured arrived at the office of the prosecuting attorney, he was questioned at some length touching the fire and was thereupon arrested under a warrant which had theretofore been issued. At the time set for the examination the insured was then confined in jail. Of course, it was impossible for the insured to attend the examination, and he did not appear at the time and place set for the same. No further demand was made upon the insured by the insurance company that he submit to examination. The insured was released from jail upon bail, a few days after his arrest, and he thereafter made no further effort to present himself for examination at the place set in the said notice. In this case the court said (p. 587):

> "The trial court submitted to the jury the question of whether or not Lewis failed without reasonable cause to submit himself for examination, and the effect of the jury's verdict was that he did not so fail. We are of the opinion that under the circumstances it would not be decided as a matter of law that Lewis failed without reasonable cause to appear at Steele's office and submit to examination as demanded by the insurance company, and that the trial court did not err to the prejudice of the insurance company in leaving that question for the jury to decide. This conclusion finds support in what may be regarded the leading decision upon that subject, in *Phillips* v. *Protection Ins. Co.*, 14 Mo. 221."

It is asserted by petitioner that the case of *Fleisch* v. *Insurance Co. of N. A.*, 58 Mo. App. 596, is directly in point. A reading of that case will disclose that it has no bearing on the case at bar and that the factual issues in that case are wholly dissimilar to the facts in the case at bar.

6.

Petitioner failed to establish its affirmative defense of fraudulent concealment, and therefore the knowledge or lack of knowledge of petitioner's agent was not involved.

The primary obstacle to the position of petitioner is that it assumes that it established the affirmative defense of fraudulent concealment. We have no quarrel with the four decisions of the Supreme Court of Illinois cited by petitioner upon the particular facts involved in each of those cases. Their application to the case at bar is not apparent.

Petitioner charged the respondents with fraudulently concealing facts from petitioner's general agent, William H. Donovan, Senior, who, it is claimed, had he known such facts, would not have issued the policy in question; and it further asserted that had petitioner learned of such facts before the fire it would have directed cancellation of the policy. That such defense is an affirmative one we believe should hardly be disputed.

We respectfully assert that petitioner wholly failed to introduce evidence of any kind from which there could reasonably be drawn the conclusion that the respondents fraudulently concealed from petitioner's general agent pertinent and relevant facts. As important on the issue of whether the respondents intended to deceive petitioner in the procuring of the policy, it is not amiss to point out to the court, albeit a repetition, that petitioner's general agent, William H. Donovan, Senior, was not only acquainted with the respondents since 1923, that being the date when he took the acknowledgment of the plaintiffs on the agreement to purchase the very property in question (Plaintiffs' Ex. 158; Tr. 158), but that William H. Donovan, Senior, was well acquainted with the respondents in

a business sort of way, and prior to the issuance of the policy of insurance here in question had other insurance transactions with respondents (Tr. 175).

It is likewise significant, we respectfully assert, that the petitioner failed to produce the one witness who could have affirmatively established the defense of fraudulent concealment, if such defense existed; it failed to produce William H. Donovan, Senior. Nor did it explain or give any reason why it failed to produce him. We believe that it is a reasonable and fair deduction to say that such failure arose solely and because William H. Donovan, Senior, would truthfully have testified that there was no concealment from him since he knew all of the facts concerning respondents which the petitioner now says were fraudulently concealed from him and thereby from it. The failure of petitioner to produce William H. Donovan, Senior, or give some reason for the failure to produce him, was the subject of comment by the Circuit Court of Appeals (Opinion, Tr. 337, 339).

In *Wharton* v. *Aetna Life Ins. Co.*, 48 F. 2d 37, that court held (p. 43) that the burden of proving that the plaintiff was chargeable with false representations was on the defendant.

In *Mercury Ins. Co.* v. *Miles,* 126 Pac. 74, 76 (Okla.) the insurance company had issued a policy of fire insurance upon an oral application therefor. The insurance company denied liability on the ground of concealment of an existing mortgage on the insured property. The Supreme Court of Oklahoma stated that this was an affirmative defense and the burden was on the insurance company to establish that defense. The judgment in favor of the insured was affirmed.

In *Penn Mutual Life Ins. Co.* v. *Mechanics' Savings B. & T. Co.,* 72 Fed. 413, 441, the court held that the burden to establish the materiality of the alleged concealment was on the defendant.

These authorities definitely and conclusively sustain the proposition of law here advanced by respondents. We respectfully urge that your Honors will look in vain in the record in the case at bar to find any evidence from which it could reasonably be concluded that the petitioner sustained the burden of establishing the affirmative defense interposed by it as a ground for defeating recovery by the respondents. It is to be borne in mind that there is no evidence in the record which establishes that the respondents did not reveal to William H. Donovan, Senior, at the time the policy was issued, the very facts which petitioner complains were fraudulently concealed. If it should be urged, and if urged it would be without foundation in the record, that the petitioner did adduce competent evidence to sustain the burden imposed on it to establish this affirmative defense, petitioner would then find itself confronted with the unanswerable bar that in any event such defense was a question of fact for the jury, and the jury resolved the issue in favor of respondents.

By an adroit method of presentation and specious reasoning the petitioner is attempting to impose upon the respondents the burden of showing that petitioner's agent had knowledge of the facts alleged to be material and to have been fraudulently concealed from petitioner and thereby hopes to persuade this Court that error was committed by the courts below. The basic misconception of the petitioner lies in the fact that it seeks to thrust upon respondents the burden of establishing the nature and extent of its agent's knowledge, and thereby seeks to escape from its complete failure to adduce any evidence upon this question of its agent's knowledge.

The statement made that knowledge of an agent acquired in the transaction of his own or another's business is not the knowledge of his principal unless such agent had such

knowledge presently in mind at the time of acting for such principal, may be correct under some circumstances and incorrect under others. In the case at bar the evidence shows William H. Donovan, Senior, was the petitioner's general agent at all material times mentioned in the testimony. It seems a fair statement that the court should properly take judicial notice of the fact that the general agent's activities for his company included the solicitation and writing of insurance. We submit that if in the course of his duties as petitioner's general agent Donovan, Senior, learned something about the respondents which would be material if the petitioner were to insure their property, and that thereafter said Donovan, Senior, for the petitioner did so insure them, then that insurance was written with knowledge of such material fact. See Mechem on Agency (2nd Ed.), Vol. 2, page 1395-6.

The situation which obtained at the time respondents procured the issuance to them of the policy of insurance here sued on is aptly stated by the court in *Carolina Ins. Co.* v. *Christopher,* 80 S.W. 2d 774 (Texas) where the court said (p. 777):

> "Plaintiff and defendant's agent lived in the same village, and the rule has been announced that, if the insurer's agent lives in the vicinity of the property and is familiar therewith, the insurer will be charged with knowledge of facts readily ascertainable. *Commercial Fire Ins. Co.* v. *Allen,* 80 Ala. 571, 1 So. 202; *Ritchey* v. *Home Ins. Co.,* 104 Mo. App. 146, 78 S. W. 341; *Short* v. *Home Ins. Co.,* 90 N. Y. 16, 43 Am. Rep. 138."

We therefore respectfully urge that for the foregoing reasons the trial court properly refused to give petitioner's requested instruction 4, and the refusal to give that instruction was proper for the reason that there was no evidence to support it.

We have previously called attention to the fact that the testimony showed there was only one agent of the petitioner whose knowledge of Roberto's indictment, conviction, imprisonment and deportation could bind the petitioner, that is, Donovan, Senior. The instruction in question was drawn on the theory that there were two or more such agents, as evidenced by the use of the plural in the word "agents" in such instruction.

Again the issue of fraudulent concealment was raised as an affirmative defense and the petitioner had the burden of showing that respondents failed to reveal the facts of which petitioner now complains. Petitioner's proof failed to establish this defense. Donovan, Senior, did not testify, and while Donovan, Jr., claimed that he did not know of Roberto's troubles that is negative evidence and does not establish that Donovan, Senior, or petitioner, did not know these facts. On this point there was no evidence. Since the petitioner failed to introduce evidence to establish its affirmative defense instruction 4 was properly refused by the court.

Petitioner seems to misapprehend the purport of the evidence relative to the newspaper articles, the respondents' acquaintance with Donovan, Senior, and the fact that there were prior business and insurance transactions between them. This evidence was offered in support of the proposition that there was no concealment perpetrated by the respondents on the petitioner. We believe it was proper for the jury to consider all these facts in determining whether there was any concealment, or whether, if the jury should find there was concealment, it was fraudulent or intentional.

The instruction is uncertain, ambiguous and confusing in its language and expression. The references to "the knowledge" which an insurance company's agents may

have acquired might well have been understood by the jury to have pertained, for example, to the fact that the respondent Ammirati's citizenship papers were surrendered by him in 1937, a fact of which petitioner's counsel made much. Again, the instruction might have been understood as informing the jury that the respondents must show that Donovan, Senior, knew of the unrecorded deeds to them. Counsel for respondent will say that the word "knowledge" as used in this instruction referred to Roberto's indictment, conviction, imprisonment and deportation. The defect in the instruction is that it did not so state and the jury had no way of reading this meaning into it.

An examination of this instruction reveals clearly that it embodies an abstract proposition of law, and its refusal was not prejudicial error.

7.

No error was committed by the trial court in refusing to permit counsel for petitioner to read to the jury from the stipulation facts orally admitted upon the trial; and in any event such refusal would be harmless error.

The statement of counsel for petitioner under this caption of its brief is not a fair presentation of what transpired in the trial court. It is first to be pointed out that the stipulation was officially a part of the court files (Tr. 109 and 152) and therefore no necessity existed for its formal introduction in evidence.

In the early part of the trial counsel for respondents desired to read to the jury two newspaper articles introduced in evidence in behalf of the respondents (respondents'-plaintiffs' Exhibits 156 and 157; Tr. 228 and 229, respectively), and at that time a short colloquy occurred between both counsel and the court, in the course of which

counsel for respondents stated that he admitted the conviction of Roberto on the charge of perjury and the affirmance of that conviction(Tr. 132).

At the conclusion of respondents' case in chief counsel for respondents read to the jury the stipulation from its beginning up to and including paragraph numbered 11 (Tr. 148, *et seq.*).

Further colloquy then took place between the court and counsel (Tr. 152) at the conclusion of which respondents rested their case. Thereupon counsel for petitioner stated that he desired to offer and read in evidence from that stipulation, and for the purpose of convenience the stipulation was marked defendant's (petitioner's) Exhibit 121 (Tr. 135). Counsel for petitioner then read certain paragraphs of the stipulation, and as to paragraphs not then read the court stated that everything contained in the paragraphs not read had been admitted by counsel for respondents (Tr. 155) and therefore the court would not permit counsel for petitioner to read such portions of the stipulation because it was a repetition and a waste of time (Tr. 155).

Counsel for petitioner, however, have carefully avoided pointing out that all of the exhibits introduced in evidence, which of course included this stipulation, were taken by the jury to the jury room upon its retirement to consider its verdict (Tr. 222).

It is urged on behalf of the petitioner that under these circumstances it was denied due process of law. Counsel for petitioner have cited no case which even remotely approaches the case at bar.

The first case cited by the defendant under this caption is *Ballard* v. *Hunter,* 204 U. S. 241. In that case a writ of error was prosecuted to review a judgment sustaining the validity of a sale of the lands of plaintiffs in error for

non payment of levee taxes. We are at a loss to perceive how and in what manner this authority has any application to the case at bar.

In *Hurtado* v. *California,* 110 U. S. 516, next cited by the defendant, Hurtado by an information filed against him was charged with the crime of murder and upon this information, and without previous investigation of the matter by any grand jury, he was arraigned and pleaded not guilty. A trial was thereafter had and the jury rendered its verdict in which it found Hurtado guilty of murder. From the judgment fixing the death penalty an appeal was taken. The judgment was affirmed.

It was claimed on behalf of Hurtado that the conviction and sentence were void on the ground that they were repugnant to the Fourteenth Article of the Amendments to the Constitution of the United States. We do not perceive that this authority has the least application to the case at bar.

All of the remaining cases cited by the petitioner under this caption of their brief are so-called "rate" cases, except *Railroad Retirement Board* v. *Alton R. R. Co.,* 295 U. S. 330, which was an action under the Railroad Retirement Act. A careful reading of each of these cases fails to disclose how any one of them is applicable to the case at bar, and how any one of them would serve to enlighten this Court or aid in a correct disposition of this petition for certiorari.

We reiterate that the refusal of the trial court to permit counsel for the petitioner to read portions of the stipulation with reference to facts which were admitted in the presence of the jury to be true, hardly warrants serious consideration in view of the host of opinions by Federal Courts that if there were error in such refusal it was harmless error.

Moreover the statutory enactment upon this subject likewise completely answers the propositions here urged by the defendant. In U.S.C.A., Title 28, Section 391, it is provided:

> "• • • On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to the technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

As illustrative of the rule we respectfully direct the attention of your Honors to *St. Louis & S. F. R. R. Co.* v. *Duke, Admx.*, 192 Fed. 306, which was an action for wrongful death. In affirming the judgment and in passing upon the receipt in evidence of certain testimony which the defendant urged was improper the court said (p. 309):

> "The admission of improper evidence over objection to establish facts proved by other evidence introduced without the objection is harmless error. (Citing authorities)."

We respectfully assert that *Great American Ins. Co.* v. *Roney & Berger Co.*, 42 F. 2d 816, is a full and complete answer adversely to the contention of the petitioner here advanced. In this authority there had been issued to Roney & Berger Co., policies of insurance by nine insurance companies for different sums which together amounted to $205,000.00. A fire occurred, resulting in a total loss of all the properties insured. When the insurance companies refused to pay, Roney & Berger Co. sued them in the State court. For lack of diversity of citizenship one suit was tried there. The remaining eight were removed to the District Court of the United States where by stipulation they were tried as one case. The plaintiffs had a ver-

dict for a total sum which was apportioned by counsel among the several defendant companies, and judgments were entered against them for their allocated amounts respectively. The eight companies appealed and, the assignments of error being identical, the cases were heard together and treated as one case.

Due to the fact that the plaintiff's books had been burned in the fire the extent of the properties destroyed and their value as shown by the books were impossible of ascertainment and therefore both parties were driven to other sources for information so that plaintiff might make a schedule for its statement of claim and to prove loss at the trial, and the defendants might resist the plaintiff's claim. In consequence there was a running fight on the value of the plant, machinery and the like. All this resulted in a mass of evidence greatly confused and sharply conflicting, which disclosed a spread between the plaintiff's total value claim of $239,585.04 and the defendants' proof of $108,302.25, through which the jury entered with a verdict for $204,416.00.

As the case involved many figures concerning the sound value of properties of different kinds, on which the parties had produced widely different testimony, the court suggested and counsel agreed to hand the jury, on retiring, statements as to their respective claims of the loss sustained. The plaintiff submitted its statement, but through a clear mistake of somebody the statement of the defendants, though produced in court, was not given to the jury. Thus the jury had, visually, the figures of the plaintiff and, mentally, those of the defendants. The failure of the jury to have the statement of the defendants was discovered only after verdict, and first came to the attention of the court on motion for a new trial.

The defendants urged that they were entitled to a new trial because of the prejudice resulting from the absence of their statement in the jury room and that the reviewing court should in justice set aside the judgment.

The reviewing court determined that although it was regrettable that the defendants' statement was not taken by the jury upon retiring, nevertheless the court was not convinced that thereby the defendants were in any wise prejudiced.

In the case at bar the entire stipulation was taken by the jury to its room upon retiring to consider its verdict. All of the exhibits were given to the marshal and by him to the jury in accordance with the usual practice (Tr. 222).

Surely if it can be said that in the above authority the defendants there were not prejudiced by the failure of the jury to have with it the defendants' statement, then beyond any question the petitioner in the case at bar was in no wise named by the ruling of the trial judge. Since the jury did take with it the stipulation and unquestionably read it in its entirety the only proper complaint that can be leveled against the ruling of the trial judge is that the jury, having heard the admissions made by counsel for respondents as to the contents of the particular paragraphs of the stipulation here under consideration, did not hear counsel for petitioner read the particular paragraphs to it, although with greater facility for understanding and consideration the entire stipulation was before it in its deliberations on all the evidence. We respectfully urge that this simple statement of what transpired in the trial is a full and complete refutation of this contention of the petitioner.

In *Missouri Valley Bridge & Iron Co.* v. *Blake,* 231 Fed. 417, plaintiff had instituted an action for personal injury

which he received while an employee of the defendant. There was a verdict and judgment for the plaintiff, and the defendant upon appeal asserted as grounds for reversal rulings upon the admission or exclusion of testimony. In affirming the judgment the court said (p. 422):

> "In the trial of a case of this kind it is hardly to be expected that some question will not be asked or reply made which, taken by itself, would be open to objection; and if every theoretical error led to reversal there would be no end to litigation. But the verdict of a jury is not to be lightly set aside, and mistakes which do not involve injustice should ordinarily be disregarded."

In *Spring Garden Ins. Co.* v. *Wood,* 233 Fed. 223 (certiorari denied 242 U. S. 631), an action had been instituted on a fire insurance policy. There was a judgment for plaintiff which was affirmed. One of the grounds urged for reversal was that the trial court refused to receive as evidence plaintiff's reports of other policies. The court held that this was not reversible error since the plaintiff admitted as true all that would have appeared from these reports (p. 266).

In *Compagnie Generale Transatlantique* v. *Bump,* 234 Fed. 52 an action was instituted by Theresa M. Bump against the defendant steamship company for personal injuries sustained by her while a passenger on a steamboat owned by it. The District Court entered a judgment upon the verdict of the jury in favor of the plaintiff.

In its opinion the court stated (p. 55):

> "• • • In every hotly contested jury trial a lawyer who reads the record with a desire to find some action by the trial judge which is open to criticism, will generally be successful. The most learned and conscientious judge will frequently make a ruling which subsequent testimony and further reflection show to

have been of doubtful propriety. But if it appears that the ruling was inconsequential and that the result was a just and proper one, it would be a manifest injustice because of such ruling to start the parties again up on the weary pilgrimage through the courts."

In *Weiner* v. *Union Trust Co.,* 261 Fed. 709, the court held (p. 713) that "where it is evident that a correct result has been reached, questions concerning the correctness of particular rulings, not affecting such result are immaterial." (Citing a number of authorities).

In *Press Publishing Co.* v. *Monteith,* 130 Fed. 356, an action for libel was instituted and a judgment given for the plaintiff. In affirming the judgment the court said (p. 362):

> "The objection of all litigation should be to arrive at a just result by a most direct, speedy and inexpensive proceeding. If such a result can be reached by absolutely inerrant methods so much the better, but while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected. I venture to think that no long continued, hotly contested trial can be conducted to a conclusion without mistakes being committed. Few minds are so constituted that they can grasp at the outset all the ramifications of a complicated controversy and, before the judge can get the perspective of the trial, some mistakes may occur, but these should be disregarded if it can be seen that the case was correctly decided and that, even if they had not been made, the same result would have been reached. Justice can be attained without infallibility."

It is urged by counsel for petitioner that the procedure adopted by the trial court, if it stands unrebuked, would lay a foundation for a procedure by which the right of all of our citizens to a fair and impartial trial by jury

would be destroyed. Just how that calamity would result is not pointed out. We exhibit little fear, and we respectfully urge that this Court need have no fear, that the trial by jury as it has been recognized since the adoption of our Constitution would thus be destroyed.

CONCLUSION.

For the many reasons above stated, it is respectfully submitted that the petition for certiorari is without merit and should be denied. No constitutional question is presented. The issues it seeks to raise are evidentiary in character and without public importance. They have been fully reviewed by the Court of Appeals. Their reconsideration by this Court is neither required nor desirable.

We respectfully ask that this Court deny the writ of certiorari.

Respectfully submitted,

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